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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL ELECTION COMMISSION,

Plaintiff,

vs.

FRIENDS OF JANE HARMAN, et al.,

Defendants.

Case No. CV 98-7691 CAS (JGx)

ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

ENTERED ON ICMS

AUG 20 1999

CV *[Signature]*

I. INTRODUCTION

This case is an enforcement action brought by the Federal Election Commission ("FEC") against defendants Friends of Jane Harman ("Harman Campaign") and Jacki Bacharach ("Bacharach"). The allegations in this lawsuit arise out of a fundraising event held for former United States Representative Jane Harman ("Harman") at the headquarters of Hughes Aircraft Company ("Hughes") on October 29, 1993 ("the October 1993 fundraiser").

The FEC filed the complaint in the present action in this Court on September 22, 1998. In its complaint, the FEC alleged that defendants violated 2 U.S.C. § 441b(a) by accepting corporate

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1 contributions, and sought an order requiring defendants to disgorge the
2 allegedly prohibited contributions, as well as civil penalties pursuant
3 to 2 U.S.C. § 437g(a)(6)(B). On March 29, 1999, this Court denied
4 defendants' motion to dismiss the complaint. The parties' cross-
5 motions for summary judgment are presently before the Court.

6 II. FACTUAL BACKGROUND

7 The FEC is a federal agency with jurisdiction over the
8 administration, interpretation, and civil enforcement of the Federal
9 Election Campaign Act of 1971 ("FECA" or "the Act"), 2 U.S.C. §§ 431
10 et seq. The Harman Campaign served as an authorized political
11 committee, as defined in 2 U.S.C. § 431(4), for Representative Harman
12 from 1992 to 1994. Bacharach served as treasurer for the Harman
13 Campaign during this time period. See 2 U.S.C. § 432(a).

14 The principal facts in this litigation are not in dispute. In
15 Spring 1993, Representative Harman met with C. Michael Armstrong
16 ("Armstrong"), then the Chief Executive Officer and Chairman of Hughes.
17 Complaint, ¶ 21; Answer, ¶ 21; Deposition of Jane Harman ("Harman
18 Depo.") at 26:14-27:9, Exhibit 5 to Plaintiff's Statement of
19 Uncontroverted Facts and Conclusions of Law ("Plaintiff's Statement").
20 Harman asked Armstrong to host a fundraiser for her campaign, and also
21 asked him to support her request for contributions from the Hughes
22 Active Citizenship Committee ("Hughes PAC"). Id. Armstrong agreed to
23 her requests, and told William Merritt ("Merritt"), Vice President of
24 Hughes' Washington D.C. office and the administrator of the Hughes PAC,
25 about the proposed fundraiser. Complaint, ¶ 21; Answer, ¶ 21. On
26 April 22, 1993, Merritt called Jo-Ann Costa ("Costa"), Hughes Director
27 of Public Affairs, and asked her to make arrangements for the
28 fundraiser. Deposition of Jo-Ann Costa ("Costa Depo.") at 38:12-40:17,

1 her meeting with Costa, and explained the arrangements made by Costa.
2 Sitzer Depo. at 62:11-22. Sitzer did not discuss the legal
3 implications of the fundraiser with Costa or anyone else at Hughes
4 after the initial lunch meeting. Id. at 76:20-77:7.

5 Costa wrote a letter to Sitzer dated May 18, 1993, thanking her
6 for her help. The letter stated: "I appreciate your interest in
7 Hughes' invitation to Ms. Harman to join us in a reception in her
8 honor." Exhibit 2 to Costa Depo. During the next few months, the date
9 of the fundraiser was changed several times based on scheduling
10 problems. In early October 1993, Merritt spoke with the Chief of Staff
11 of Harman's congressional office to schedule a date for the Hughes
12 event. The fundraiser was set for October 29, 1993. Costa Depo. at
13 92:18-93-13. Costa contacted Sitzer to ensure that Sitzer knew the
14 October 29th date had been agreed upon. Complaint, ¶ 24; Answer, ¶ 24.
15 Sitzer suggested to Costa that the contributions be sent to the Harman
16 Campaign's post office box, which was the normal practice for receiving
17 contributions to the Campaign. Sitzer Depo. at 102:10-103-4. Sitzer
18 testified that with respect to this fundraiser, the contributions were
19 instead collected by Costa because "[t]hat is the way Hughes wanted it
20 to be done." Id. at 102:10-13.

21 In early October 1993, Hughes distributed two invitations to the
22 fundraiser. The first invitation was on Hughes corporate stationery
23 and dated October 12, 1993 ("the October 12 letter"). This letter was
24 drafted by Costa and signed by Armstrong. Costa Depo. at 105:3-10,
25 109-16-110:3. The letter states "I would personally like to invite you
26 to a reception for U.S. Congresswoman Jane Harman on October 29, 1993."
27 Exhibit 7 to Costa Depo. The letter requested that the addressee
28 respond to Costa. Id. Costa distributed a draft of the October 12

1 letter to T.G. Westerman ("Westerman"), Senior Vice President for Human
2 Resources and Administration and Chief Administrative Officer for
3 Hughes, Larry Wheeler, Hughes' Director of Congressional Affairs,
4 Merritt, and possibly Sitzer for review.¹ Costa Depo. at 111:3-13.
5 Westerman, who was Costa's supervisor, made a few minor word changes
6 to the draft. Id. at 111:8-15. Armstrong also saw a draft of the
7 letter. Deposition of C. Michael Armstrong ("Armstrong Depo.") at
8 26:15-18, Exhibit 2 to Plaintiff's Statement. Costa also read the
9 letter to Hughes' outside counsel over the phone. Costa Depo. at
10 114:7-12. This letter was sent to approximately 233 Hughes executives.

11 Costa also drafted a second invitation letter for the fundraiser
12 dated October 13, 1993 ("the October 13 letter"). This letter states
13 in part:

14 You've probably received Mike's invitation to the
15 reception for U.S. Congresswoman Jane Harman on
16 October 29th by now. This letter is to ask you and
17 your senior people to participate in the
fundraising portion of the event as Ms. Harman is
certain to face well-financed opposition in the
next election.

18 Exhibit 8 to Costa Depo. The letter then specifies contribution
19 amounts according to corporate position, and continues as follows:

20 Please extend the invitation to contribute to the
21 senior people (Staff Vice Presidents and E9's)
22 reporting to you. Contributions are voluntary.

23 Personal checks should be made payable to "Friends of
24 Jane Harman" Corporate funds cannot be
accepted pursuant to Federal Election Commission law.

25
26 ¹ It is not clear from the record whether Sitzer actually
27 received a copy of this letter. Costa stated in her deposition: "I
28 believe I faxed a copy [of the October 12 letter] to Judy Sitzer
because she had asked me earlier to send her a copy of the
invitation." Costa Depo. at 111:9-11. For her part, Sitzer does not
remember receiving a copy of this letter. Sitzer Depo. at 72:5-73-8.

1 On October 25, 1993, Costa received a memorandum from Jim Sutton
2 of the Nielsen firm ("the October 20 memo"). The memorandum is dated
3 October 20, 1993, but was not read by Costa until October 27, 1993.
4 Id. at 141:1-3. The memorandum sets forth the following issue as being
5 the basic question:

6 Jo-Ann Costa asked whether Hughes could host an event
7 for Congresswoman Jane Harman. The basic question is
8 whether Hughes may pay for the cost of this event out
9 of corporate funds, or whether Hughes PAC or
10 Congressman [sic] Harman's campaign committee must
11 reimburse the corporation for the costs of the event.

12 Exhibit 9 to Costa Depo. The memorandum is divided into two
13 subheadings labeled "A. Events financed by Hughes" and "B. Events
14 financed by PAC or candidate." The advice contained under subheading
15 "B" reads in relevant part:

16 If the PAC or the candidate's committee reimburses the
17 corporation for the costs of the event, then the
18 corporation may invite employees or others outside of
19 its restricted class. A return envelope may also be
20 included in invitations to a PAC or candidate-financed
21 fundraiser, though the corporation may not allow checks
22 to be sent through interoffice mail or use corporate
23 letterhead. In addition, attendees may be charged a
24 fee (in other words, a campaign contribution) for
25 attending the fundraising event, though they may not be
26 charged a fee for attending a partisan communication
27 candidate appearance.

28 Id. Costa stated that the advice was "significantly different than the
advice that I was given verbally on the phone [when discussing the
letters]." Costa Depo. at 143:10-16. Specifically, Costa contends
that some of the advice in the October 20 memo - particularly as to the
propriety of her use of corporate letterhead and collection of employee

26 ²(...continued)
27 recollection of this letter being faxed to her, although I suspect I
28 did fax it to her. I just don't know." Costa Depo. at 119:10-17.
Sitzer does not remember receiving a copy of the October 13 letter.
Sitzer Depo. at 73:4-8.

1 contributions through interoffice mail -- was contrary to advice she had
2 previously been given.'

3 On approximately October 27, 1993, Costa sent a copy of the
4 October 20 memo to Joe Dooley ("Dooley"), Hughes Manager of State
5 Government Relations, along with a note reading:

6 Let's discuss the Harman fundraiser. We are okay, but
7 Sutton's letter is dated 10/20 - long after Chip
8 Nielsen's initial telephone advice the first of
October. Letters went out on the 13th. I believe he
did not have his facts real straight.

9 Id. at 145:17-21; Exhibit 12 to Costa Depo. Dooley and Costa discussed
10 the contents of the October 20 memo. They concluded that any
11 differences between the October 20 memo and the earlier advice were
12 "technical," and that it was too late to stop the fundraiser only two
13 days before the event. Costa Depo. at 145:22-146:6. Costa and Dooley
14 did not tell anyone else about the October 20 memo at that time. Id.
15 at 148:21-150:21. There is no dispute that no representative of the
16 Harman Campaign was ever advised prior to the filing of the complaint
17 in the FEC administrative action of the October 20 memo or the ensuing
18 discussion between Dooley and Costa.

19 On October 29, 1993, Representative Harman appeared at the
20 fundraiser held at in the executive dining room of Hughes' corporate
21

22 In her deposition, Costa testified: "There is a lot that is
23 different, but specifically what I zeroed in on was on page 2: 'A
24 return envelope may also be included in invitations to a PAC or
25 candidate-financed fundraiser, though the corporation may not allow
26 checks to be sent through interoffice mail or use corporation
27 letterhead.' That stood out like a sore thumb to me because we
28 discussed that in our previous conversation and this was not at issue
at the time. In reading this against the advice that I had been
previously given, it was very confusing in that it appeared that I had
done parts of A and parts of B, but I hadn't been consistent with
either A or B in its entirety." Costa Depo. at 144:1-20.

441b(a) by knowingly accepting corporate campaign contributions. The General Counsel of the FEC notified defendants on October 7, 1997, that the General Counsel was prepared to recommend that the FEC find probable cause to believe that defendants violated section 441b(a) by knowingly accepting corporate campaign contributions. Defendants filed a response with the FEC. On March 3, 1998, the FEC, by affirmative votes of four members, found probable cause to believe that defendants had violated provisions of the Act. Defendants were notified of this decision by letter, along with a proposed conciliation agreement. Pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), the parties attempted for at least thirty days to use informal methods to resolve the issue. The parties were unable to reach a resolution through informal methods, and the FEC subsequently authorized the commencement of the instant action against defendants.'

IV. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving

In September 1996, Hughes entered into a conciliation agreement with the FEC. The agreement provides that, "[n]otwithstanding the belief of [Hughes] that the event was conducted in compliance with the Act," Hughes violated 2 U.S.C. § 441b(a) "by providing the use of corporate facilities and personnel for fundraising activities and by facilitating the making of \$21,000 in contributions" to the Harman Campaign. Exhibit 16 to Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment. Hughes paid a civil penalty in connection with this agreement.

1 party seeks judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323
2 (1986). If the moving party bears the burden of proof at trial, "the
3 moving party must make a showing sufficient for the court to hold that
4 no reasonable trier of fact could find other than for the moving
5 party." Gipson v. Kajima Eng'g & Constr., Inc., 972 F. Supp. 537 (C.
6 D. Cal. 1997).

7 If the moving party has sustained its burden, the nonmoving party
8 must then identify specific facts, drawn from materials on file, that
9 demonstrate that there is a dispute as to material facts on the
10 elements that the moving party has contested. See Fed. R. Civ. P.
11 56(c). The nonmoving party must not simply rely on the pleadings and
12 must do more than make "conclusory allegations [in] an affidavit."
13 Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990). See also
14 Celotex Corp., 477 U.S. at 324. Summary judgment must be granted for
15 the moving party if the nonmoving party "fails to make a showing
16 sufficient to establish the existence of an element essential to that
17 party's case, and on which that party will bear the burden of proof at
18 trial." Id. at 322. See also Abromson v. American Pac. Corp., 114
19 F.3d 898, 902 (9th Cir. 1997).

20 In light of the facts presented by the nonmoving party, along with
21 any undisputed facts, the Court must decide whether the moving party
22 is entitled to judgment as a matter of law. See T.W. Elec. Serv., Inc.
23 v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir.
24 1987). When deciding a motion for summary judgment, "the inferences
25 to be drawn from the underlying facts . . . must be viewed in the light
26 most favorable to the party opposing the motion." Matsushita Elec.
27 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation
28 omitted); Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d

1 1332, 1335 (9th Cir. 1997). Summary judgment for the moving party is
2 proper when a rational trier of fact would not be able to find for the
3 nonmoving party on the claims at issue. See Matsushita, 475 U.S. at
4 587.

5 In this case, the parties have stipulated as to the material
6 facts, and agree that these cross motions present issues to be decided
7 as a matter of law.

8 V. DISCUSSION

9 A. Background

10 The complaint in this action alleges that defendants committed two
11 violations of section 441b(a) of the Federal Election Campaign Act in
12 connection with the October 1993 fundraiser. Section 441b(a) prohibits
13 corporations from using general treasury funds "to make a contribution
14 or expenditure in connection with any election" in connection with
15 federal elections. 2 U.S.C. § 441b(a).⁵ A "contribution" or
16 "expenditure" includes "any direct or indirect payment, distribution,
17 loan, advance, deposit, or gift of money, or any services, or anything
18 of value" to any candidate for federal office. 2 U.S.C. § 441b(b)(2).
19 In turn, it is unlawful for political committees or candidates
20 knowingly to receive prohibited contributions or expenditures. 2
21 U.S.C. § 441b(a).

22
23
24 ⁵ Section 441b(a) provides in relevant part:

25 It is unlawful for . . . any corporation whatever . . . to make
26 a contribution or expenditure in connection with any election .
27 . . or in connection with any primary election . . . or for any
28 candidate, political committee, or other person knowingly to
accept or receive any contribution prohibited by this section .
. . . .

1 The FEC first alleges that defendants violated section 441b(a) "by
2 knowingly accepting \$20,600 in corporate contributions." Complaint,
3 ¶ 35. Second, the FEC contends that defendants violated section
4 441b(a) "by knowingly accepting an advance of \$857.46 in corporate
5 funds." Id., ¶ 38. The FEC argues that because the undisputed facts
6 in this litigation demonstrate that defendants violated the Act,
7 summary judgment in its favor is appropriate.

8 Defendants make several arguments in opposition to the FEC's
9 motion and in support of their motion for summary judgment. First,
10 defendants argue that their conduct did not violate section 441b(a),
11 and conformed with the regulations that were in effect in 1993.
12 Second, defendants claim that they reasonably relied in good faith on
13 the advice of counsel that the fundraiser was conducted in a lawful
14 manner. Third, defendants contend that the FEC has pursued
15 inconsistent theories of liability in these proceedings, to the
16 prejudice of defendants. Fourth, defendants argue that the FEC is
17 attempting retroactively to enforce rules not in existence at the time
18 of the October 1993 fundraiser, and consequently, by this proceeding,
19 the FEC seeks relief that is violative of defendants' due process
20 rights. Finally, defendants contend that the FEC has acted arbitrarily
21 and capriciously in filing this action in violation of the
22 Administrative Procedure Act.⁶

23 ///

24 _____
25 ⁶ Defendants' first and fourth arguments are addressed below in
26 assessing the merits of the FEC's claims against defendants. The
27 Court finds that defendants' contention regarding their reliance on
28 the advice of counsel is more appropriately addressed in evaluating
whether penalties should be assessed in this action. Defendants'
third and fifth arguments do not bear on whether a violation of the
FECA occurred.

1 B. "Earmarked Contributions"

2 The FEC first contends that defendants violated the broad language
3 of section 441b(a) by knowingly accepting \$20,600 in corporate
4 contributions. There is no dispute that the contributions to the
5 Harman Campaign came from individual Hughes employees, and not from
6 Hughes' corporate treasury. Accordingly, it cannot be said that the
7 violation was the acceptance of corporate contributions. Rather, this
8 case concerns the role of Costa, a Hughes employee, in collecting and
9 forwarding individual contributions made by Hughes executives to the
10 Harman Campaign. The FEC contends that because Costa's conduct
11 violated the Act's prohibition on corporations acting as conduits or
12 intermediaries, the Harman Campaign received an impermissible corporate
13 benefit by accepting the contributions collected by Costa.'

14 In support of its argument that Costa's actions violated the FECA,
15 the FEC relies on regulations concerning "earmarked contributions."
16 Section 110.6(a) of the Code of Federal Regulations provides:

17 All contributions by a person made on behalf of or to
18 a candidate, including contributions which are in any
19 way earmarked or otherwise directed to the candidate
20 through an intermediary or through an intermediary or
21 conduit, are contributions from the person to the
22 candidate.

23 11 C.F.R. § 110.6(a). The regulation states that "conduit or
24 intermediary means any person who receives and forwards an earmarked
25
26
27

28 ' At a telephonic hearing on these motions, the FEC conceded
that had Costa requested that Hughes employees mail their
contributions to the Harman Campaign directly, there would have been
no violation of the conduit provisions of the FECA. See Reporter's
Transcript of Telephonic Conference ("Rep.'s Tr."), July 21, 1999, at
4:21-5:17.

 ' These regulations were promulgated under 2 U.S.C. §
441a(a)(8), a section of the Act dealing with contribution limits.

1 contribution to a candidate or a candidate's authorized committee."
2 11 C.F.R. § 110.6(b)(2). The regulation then lists a number of persons
3 who are not considered conduits or intermediaries, including campaign
4 committee volunteers, fundraising representatives, and commercial
5 fundraising firms. 11 C.F.R. § 110.6(b)(2)(i). Section
6 110.6(b)(2)(ii) provides in relevant part:

7 Any person who is prohibited from making contributions
8 or expenditures in connection with an election for
9 Federal office shall be prohibited from acting as a
conduit for contributions earmarked to candidates or
their authorized committees.

10 11 C.F.R. § 110.6(b)(2)(ii). The remainder of the regulation addresses
11 reporting requirements for these so-called "earmarked contributions."

12 The FEC contends that by reading section 110.6(b)(2)(ii) in
13 conjunction with section 441b(a), the language "any person who is
14 prohibited from making contributions or expenditures in connection with
15 an election for Federal office" includes corporations.' Consequently,
16 the FEC argues, Hughes was prohibited from acting as a "conduit" or
17 "intermediary" for contributions directed to the Harman Campaign. The
18 FEC contends that Costa's actions, as a Hughes employee, in collecting,
19 holding, and forwarding the individual checks, violated the conduit
20 rules in section 110.6(b)(2)(ii).

21 As noted above, section 441b(a) prohibits candidates or their
22 committees from accepting "anything of value" from a corporation. See
23 2 U.S.C. § 441b(b)(2). Therefore, the FEC argues that in this case
24 defendants received an impermissible corporate benefit in accepting the
25

26
27 ' Section 431(11) of the FECA provides that for purposes of the
28 Act "the term 'person' includes an individual, partnership, committee,
association, corporation, labor organization, or any other
organization" 2 U.S.C. § 431(11).

1 Id. (citations omitted).

2 The facts surrounding the collection of the contributions in this
3 case are undisputed. The October 13 letter requested Hughes employees
4 to forward contributions for the Harman Campaign to Costa in advance
5 of the fundraiser via interoffice mail. Costa testified that she
6 received some contributions prior to the event, and collected others
7 at the event. There is also no dispute that Sitzler picked up the
8 \$20,600 in individual contributions from Costa a few days after the
9 event.

10 Section 441b does not expressly state whether the acceptance of
11 a bundle of contributions from a corporate employee constitutes an
12 impermissible corporate contribution. Therefore, this Court must
13 determine whether the interpretation of section 441b by the FEC is
14 "based upon a permissible interpretation of the statute." Ted Haley,
15 852 F.2d at 1113.

16 The interpretation of the FECA by the FEC through regulations "is
17 entitled to due deference and is to be accepted by the court unless
18 demonstrably irrational or clearly contrary to the plain meaning of the
19 statute." Id. at 1115. Defendants argue that the FEC's interpretation
20 is incorrect, and that under the regulations in existence at the time,
21 it was unclear that the corporate facilitation of contributions
22 constituted an impermissible benefit.¹⁰

23
24 ¹⁰ Defendants place great reliance on 11 C.F.R. § 114.9(d),
25 promulgated under the statute prohibiting corporate contributions, 2
26 U.S.C. § 441b. Section 114.9(d) provides as follows:

27 Persons, [who are not acting in an individual volunteer
28 facilities, such as by using telephones or typewriters or
(continued...)]

1 If Costa, in her capacity as a Hughes employee, was acting as a
2 conduit or intermediary, then her conduct violated the prohibition
3 against a corporation acting as a conduit or intermediary. The Court
4 finds that Costa's actions in collecting checks conferred a benefit on
5 the Harman Campaign. Consequently, when Sitzler received the checks
6 collected by Costa, there was an apparent violation of section 441b's
7 prohibition against accepting "anything of value" from a corporation."

8 Therefore, the Court concludes that despite the arguably unclear
9 nature of the statutory and regulatory prohibitions at the time of the
10 events in question, the FEC's interpretation of the FECA is entitled
11 to deference, and is reasonable, and the Harman Campaign violated
12
13

14 ¹⁰(...continued)

15 borrowing office furniture, for activity in connection with a
16 Federal election are required to reimburse the corporation or
17 labor organization within a commercially reasonable time in the
18 amount of the normal and usual rental charge.

19 Defendants argue that this language permitted Costa, who was not
20 acting as a volunteer, to engage in the activities set forth therein.
21 However, section 110.6(b)(2)(ii), also in effect at that time, clearly
22 prohibited Costa (as a corporate employee) from acting as a conduit
23 for contributions to the campaign. Nonetheless, the fact that section
24 110.6 was not promulgated under section 441b (the statute at issue in
25 this litigation) lends some weight to defendants' due process
26 argument.

27 ¹¹ The statute prohibits a campaign committee from "knowingly"
28 accepting or receiving a prohibited contribution. The statute does
not require knowledge of the illegality of the conduct at issue. A
"knowing" standard, as opposed to a "knowing and willful" one, does
not require knowledge that one is violating a law, but merely requires
an intent to act." Federal Election Comm'n v. Damesi for Congress,
640 F. Supp. 985, 987 (D.N.J. 1986); see also Federal Election Comm'n
v. California Med. Ass'n, 502 F. Supp. 196, 203-204 (N.D. Cal. 1980)
(finding that party's knowledge of the facts making his conduct
unlawful constitutes a "knowing acceptance" under the Act).

1 2 U.S.C. § 441b(a) by accepting individual contributions collected by
2 a corporate intermediary.¹²

3 C. Reimbursement

4 The FEC also contends that defendants violated section 441b(a) by
5 accepting an advance of \$857.46 in corporate funds. The principal
6 facts surrounding this issue are also not in dispute. Hughes incurred
7 costs in connection with the October 1993 fundraiser, and billed the
8 Harman Campaign for these costs following the event. The invoice
9 submitted to the Harman Campaign consisted of \$731.46 in staff labor
10 and \$126.00 in miscellaneous facilities and administrative costs. The
11 Harman Campaign reimbursed Hughes in the amount of \$857.46 on February
12 9, 1994.

13 Defendants argue that the reimbursement of costs for the use of
14 corporate facilities was expressly permitted under regulations existing
15 in 1993. Defendants point to section 114.9 of the Code of Federal
16 Regulations, which sets forth the rules concerning the use of corporate
17 or labor organization facilities by candidates. Defendants contend
18 that 11 C.F.R. § 114.9(d) expressly allowed the conduct in the present
19 case. Section 114.9(d) provides in part:

20 [P]ersons . . . who make any use of corporate or labor
21 organization facilities, such as by using telephones or
22 typewriters or borrowing office furniture, for activity
23 in connection with a Federal election are required to
reimburse the corporation or labor organization within
a commercially reasonable time in the amount of the
normal and usual rental charge

24 ///

25 ///

26
27 ¹² To the extent the FEC asserts claims against Bacharach in her
28 capacity as treasurer for the Harman Campaign, the Court reaches the
same conclusions as it does with respect to the Harman Campaign.

1 11 C.F.R. § 114.9(d). Defendants claim that by reimbursing Hughes for
2 the use of its facilities within a commercially reasonable time after
3 the event, they complied with existing law.

4 The FEC argues that under the circumstances of this case
5 reimbursement under section 114.9(d) was not permissible. The FEC
6 contends that while section 114.9(d) allows for reimbursement for the
7 use of facilities, it does not allow for the reimbursement of labor
8 costs. Therefore, the FEC claims that the use of corporate employee
9 services by the Harman Campaign constituted an advance of corporate
10 funds in violation of the Act.

11 The broad language of section 441a(b)(2) provides that
12 "contribution" or "expenditure" includes an "advance" or "any
13 services." The language of section 114.9(d) appears to allow for
14 reimbursement for the use of corporate facilities, and does not specify
15 whether labor costs could be reimbursed. Pursuant to the standard set
16 forth above, it appears that the Court must defer to the construction
17 of the statute advanced by the FEC. Because the Harman Campaign did
18 not pay for the use of employee services until after the event
19 occurred, it appears that \$731.46 constituted an "advance" of corporate
20 funds, and was therefore an impermissible contribution."

21 VI. PENALTIES

22 A. Background

23 On the basis of the undisputed evidence before the Court, the
24 Court concludes that defendants violated section 441b(a) of the FECA
25

26
27 " The Court finds that plaintiff's motion for additional
28 discovery pursuant to Rule 56(f) concerning the reasonableness of the
Hughes invoice and rental rates for the use facility is rendered moot
by virtue of the Court's findings and conclusions herein.

1 by accepting corporate contributions. However, a close examination of
2 the facts surrounding defendants' conduct indicates that these were not
3 deliberate violations of the federal election laws. There is no
4 evidence that defendants believed at the time that the fundraiser was
5 not being conducted in accordance with existing law. In addition, the
6 Court notes that the violations themselves are not substantial nor
7 obvious. The FEC concedes that with only modest modifications, the
8 events surrounding the 1993 fundraiser would have been perfectly legal.
9 For example, if the contributions by Hughes executives had gone to a
10 post office box, and a Harman Campaign employee had collected
11 individual checks at the fundraiser, the "conduit" issue would not have
12 arisen. See Rep.'s Tr. at 4:21-5:17. If the Harman Campaign had paid
13 Hughes in advance for employee time, defendants' reimbursement for
14 their services would also not be at issue. Furthermore, as defendants
15 point out, the FEC issued clarifying regulations with respect to
16 "corporate facilitation" of contributions subsequent to the events at
17 issue in this litigation. See id. at 8:16-9:6. The regulations
18 currently in effect clarify the scope of permissible corporate
19 activity." The case before the Court involves a detailed analysis of
20 complex statutes and regulations, with fine lines separating
21 permissible and impermissible activity. Consequently, although the
22 Court finds that violations occurred, it is with the above

23 ///

24 _____
25 " For example, 11 C.F.R. § 114.2, which deals with corporate
26 "facilitation" of contributions, explicitly provides that corporate
27 employees may "plan, organize or carry out" a fundraising project so
28 long as the corporation "receives advance payment for the fair market
value of such services." 11 C.F.R. § 114.2(f)(2)(i)(A). No such
regulation existed at the time of the activities at issue in the
present case.

1 considerations in mind that the Court addresses the FEC's request for
2 penalties and injunctive relief in this action.¹⁵

3 B. Applicable Law

4 Section 437g(a)(6)(B) of the FECA provides that upon a finding
5 that the Act has been violated:

6 [T]he court may grant a permanent or temporary injunction,
7 restraining order, or other order, including a civil penalty
8 which does not exceed the greater of \$5,000 or an amount
9 equal to any contribution or expenditure involved in such
10 violation, upon a proper showing that the person involved has
11 committed, or is about to commit (if the relief sought is a
12 permanent or temporary injunction or a restraining order),
13 a violation of this Act

14 2 U.S.C. § 437g(a)(6)(B).

15 C. Penalties and Disgorgement

16 As the statutory language makes clear, "[t]he assessment of civil
17 penalties is discretionary." Ted Haley, 852 F.2d at 1116. "[I]n
18 determining the amount of a penalty, a district court should consider
19 (1) the good or bad faith of the defendants; (2) the injury to the
20 public; (3) the defendant's ability to pay; and (4) the necessity of
21 vindicating the authority of the responsible federal agency." Federal
22 Election Comm'n v. Furgatch, 869 F.2d 1256, 1258 (9th Cir. 1989).

23 The FEC contends that defendants should be required to disgorge
24 the amount of the unlawful contributions along with an additional civil
25 penalty. The FEC contends that disgorgement is appropriate to
26 eliminate the benefit accrued to defendants from the unlawful

27 ¹⁵ The FEC seeks the following relief: (1) a declaration that
28 defendants violated section 441b(a) by knowingly accepting corporate
contributions; (2) a permanent injunction preventing defendants from
future violations of the Act; (3) disgorgement in an amount equal to
the amount of contributions received; and (4) an "appropriate civil
penalty" pursuant to 2 U.S.C. § 437g(a)(6)(B).

1 contributions. The FEC argues that a penalty should also be imposed
2 as a deterrent to future violations.

3 Defendants' state of mind is clearly relevant in assessing the
4 amount of a penalty. See id. at 1259 n.2; Ted Haley, 852 F.2d at 1116.
5 In Ted Haley, the Ninth Circuit upheld the district court's decision
6 not to impose any civil penalties where the good faith of the
7 defendants was apparent. "The circumstances of [appellees'] candid
8 reporting of the loan guarantees, the rapid repayment of the loan by
9 the former candidate from personal funds and the clear innocence of
10 [appellees'] motives leaves no justifiable grounds for assessment of
11 penalties." Ted Haley, 852 F.2d at 1116 (quoting district court
12 decision).

13 The Court finds that the absence of evidence that defendants
14 intended to accept improper contributions is a significant factor in
15 determining whether disgorgement or a penalty is appropriate. In
16 defending this litigation, defendants argue that they relied on the
17 advice of Hughes' counsel. The Court concludes that this fact is
18 relevant to evaluating defendants' belief that their conduct was
19 lawful.

20 The FEC argues that defendants cannot rely on an "advice of
21 counsel" defense in this action because defendants actually relied on
22 a Hughes employee, and not directly on their own attorneys. It appears
23 that indirect reliance on the advice of counsel to a third party is
24 appropriate where "the interests of the defendant and the person on
25 whose counsel he is relying are substantially the same." Douglas Hawes
26 and Thomas Sherrard, "Reliance on Advice of Counsel as a Defense in
27 Corporate and Securities Cases," 62 Va. L. Rev. 1, 28 (1976); see also
28 United States v. Crosby, 294 F.2d 928, 942 (2d Cir. 1961) (in criminal

proceeding involving sales of unregistered securities, brokers' good faith reliance on advice of the issuer's counsel to the effect that registration was not required was a valid defense to criminal liability). Costa told the Nielsen firm about the fundraiser, and asked for advice concerning the legal requirements for holding the event. The evidence demonstrates that Costa told Sitzler that she had consulted with legal counsel, and that Sitzler relied in good faith on Costa's representations that the fundraiser was conducted in accordance with legal requirements.¹⁶ Under these circumstances, it was reasonable for the Harman Campaign to rely on the representation that Hughes' counsel had determined that the fundraiser was conducted lawfully. Consequently, the Court finds that defendants' belief that the fundraiser was in compliance with federal election law is relevant to demonstrating defendants' good faith. Moreover, even if the advice of

¹⁶ In a declaration dated July 24, 1996, Sitzler stated:

2. In the fall of 1993, I met with Jo Ann Costa to discuss the details of the potential fund-raiser for Congresswoman Harman.

3. At that meeting Jo Ann told me that she had been instructed by the Hughes legal counsel about what the parameters would be for their involvement. . . . Jo Ann had very specific instructions as to how this fund-raiser needed to be handled including billing by Hughes and payment by the Harman campaign and I agreed to all criteria.

4. At all times during my dealings with Hughes, I acted in response to the directions I received from the Hughes legal counsel via Jo Ann Costa.

Exhibit 6 to Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment.

1 counsel defense were not available, the FEC has failed to show that
2 defendants acted in bad faith.

3 Even if defendants acted in good faith, the FEC argues that
4 disgorgement and a penalty are appropriate because of the public harm
5 caused by the violations.

6 Deliberate or serious violations of the federal election laws may
7 lead to a finding of public harm. See Furgatch, 869 F.2d at 1259
8 (finding that importance of reporting and disclosure provisions in
9 federal election law "justify a rule allowing a district court to
10 presume harm to the public from the magnitude or seriousness of the
11 violation of these provisions"). As discussed above, it does not
12 appear that deliberate or serious violations occurred in this case.

13 The FEC also contends that based on defendants' "determined
14 resistance" to conciliation in this action, a penalty should be
15 assessed. The Court concludes that this argument is without merit.
16 Defendants were entitled to have the complicated statutory and
17 regulatory issues in this case determined by a court. Cf. California
18 Med. Ass'n, 502 F. Supp. at 204 (noting that FEC limited penalty
19 request "because of the complex constitutional and statutory questions
20 surrounding this litigation").

21 Based on the nature of the violations involved in this case, the
22 absence of any showing that such violations were deliberate or that
23 defendants acted in bad faith, the Court finds that disgorgement of the
24 contributions collected at the October 1993 fundraiser is

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1 inappropriate. The Court further finds that a civil penalty is not
2 warranted under the circumstances of this case.¹⁷

3 D. Injunctive relief

4 The FEC also seeks a permanent injunction against defendants for
5 future violations of the Act. Injunctive relief is appropriate only
6 when there is a likelihood of future violations. See id.; Furgatch,
7 869 F.2d at 1262; Federal Election Comm'n v. Committee of 100
8 Democrats, 844 F. Supp. 1, 8 (D.D.C. 1993).

9 No evidence has been submitted by the FEC that defendants have
10 ever violated any other provisions of the Act. In addition, the Harman
11 Campaign is no longer in existence, and Representative Harman is no
12 longer in office. The Court finds that under these circumstances, the
13 likelihood of future violations is extremely remote, if not non-
14 existent. Consequently, the Court finds that injunctive relief is not
15 warranted in this action.

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26 ¹⁷ Plaintiff has also filed a request for additional discovery
27 pursuant to Rule 56(f) regarding the advice of counsel defense. The
28 Court finds that additional discovery on this subject is irrelevant
because it could not affect the Court's disposition of this matter.

1 VII. CONCLUSION

2 For the reasons set forth above, plaintiff's motion for summary
3 judgment is hereby granted, and defendants' motion for summary judgment
4 is denied. The Court finds that based on the facts and circumstances
5 of this case no penalty or injunctive relief is appropriate. Each side
6 shall bear its own attorneys' fees and costs.

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8 IT IS SO ORDERED.

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10 DATED: August 18, 1999.

11 Christina A. Snyder
12 CHRISTINA A. SNYDER
13 UNITED STATES DISTRICT JUDGE
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